COPY

No. 334

In the Supreme Court of the United States

OCTOBER TERM, 1960

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 27-34) is not yet reported. The findings and orders of the Civil Aeronautics Board (J.A. 45, 127, 275[1]) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1960 (Pet. 35), and a petition for re-

[1] "J.A." refers to the joint appendix in the court of appeals.

hearing was denied on July 13, 1960 (R. 320). The petition for a writ of certiorari was filed on August 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In determining subsidy mail pay for a carrier's international operations, the Civil Aeronautics Board applied a rate that gave the carrier a return, after taxes, of 7% for past operations and 10% for anticipated future operations. The court of appeals reversed the award because of the Board's failure to follow the statutory requirement that subsidy cannot exceed the need of the carrier as a whole, and remanded the case to the Board to redetermine subsidy on the proper basis. The following questions are presented:

1. Whether, upon such remand, the Board was authorized to recompute the subsidy for the future period, which by then had become a past period, on the basis of the carrier's actual operating results, which showed that under the prior future rate the carrier had received a subsidy return of 36% on investment rather than the 10% that the Board had found the carrier needed.

2. Whether the Board was justified in refusing to reexamine its prior findings, not challenged in the review proceedings, that a return after taxes of 7% satisfied the carrier's subsidy need for the past period.

STATUTE INVOLVED

The pertinent provisions of Section 406 of the Federal Aviation Act (formerly, and without substantive change as it affects this case, the Civil Aeronautics Act) are set forth in Appendix B of the petition for certiorari.

STATEMENT

This case involves a subsidy mail rate fixed by the Civil Aeronautics Board pursuant to the remand in *Summerfield, Postmaster General* v. *Civil Aeronautics Board*, 207 F. 2d 207, affirmed *sub nom. Delta Air Lines* v. *Summerfield*, 347 U.S. 74. The Board had there awarded subsidy for the international operations of Chicago and Southern Air Lines (subsequently merged into petitioner Delta Air Lines) without consideration of the carrier's "excess" earnings from its subsidized domestic operations. The court of appeals, and subsequently this Court, held that the subsidy standard in Section 406 of the then Civil Aeronautics Act (Pet. App. B) was the "need" of the carrier's entire operations viewed as a whole, *i.e.*, that the entire system revenues and the over-all financial position were to be considered in fixing subsidy for any portion of the carrier's operations. The court of appeals set aside the Board order and remanded the case to the agency "with directions to determine and fix the rate in accordance with this opinion" (207 F. 2d at 210).

The order which was set aside (E-5793, J.A. 19) had fixed a "lump sum" subsidy payment for the

international operations for the period November 1, 1946-December 15, 1950, and a subsidy rate based on miles flown for the future international operations beginning December 16, 1950. This "future period" rate continued in force until August 1, 1952, when it was supplanted by a new final prospective rate which was not challenged. Thus, when Order E-5793 was set aside and the case remanded to the Board in 1954, the Board had to redetermine subsidy on the basis that it could not exceed "the need of the carrier as a whole" (207 F. 2d at 209).

The issues in the remanded proceeding here pertinent related to (1) the period of time for which the rate was to be redetermined, *i.e.*, whether for only the past period November 1, 1946-December 15, 1950, or for some or all of the former future period December 16, 1950-July 31, 1952; and (2) the extent to which the Board was required, in determining the carrier's need as a whole for whatever period was selected, to reexamine prior subsidy rates which it had previously fixed on the basis of actual operating experience for various portions of the C & S operations. The carrier contended that only that portion of Order E-5793 fixing the rate for the then past period had been judicially challenged by the Postmaster General; and that the Board could not, and in any event should not, redetermine the rate level for any part of the future period December 16, 1950 to July 31, 1952, which by then had become a past period involving known operating results for all portions of the carrier's operations.

The Board held that it should award subsidy for the entire 1946-1952 period embraced by Order E-5793, based on actual operating results rather than prior estimates (J.A. 47). It rejected the contention that the Postmaster General's challenge had been only to the past period rate (J.A. 47), and found no "waiver" by the government of a right to "offset" domestic profits for a portion of the future period (J.A. 59-61).[2] It further ruled that there was no basis for the carrier's claim that it had been entitled to rely upon the assumption that the Board would not reexamine the future portion of the rate (J.A. 53), or any prejudice to the carrier from the redetermination in terms of the statutory "need" criteria (J.A. 161-164). The Board likewise rejected the contention that, since the Postmaster General had not addressed a challenge to the specific level of the "future period" international rate (as opposed to contending that it should be reduced by offset of profits from the domestic operations), a redetermination of the rate level would be contrary to the mandate of the court of appeals as a matter which could have been, but which was not, litigated in the review proceeding (J.A. 50-51).

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[2] While the Postmaster General's petition for review in terms had challenged the entire order (see J.A. 47), his brief in the court of appeals had stated (see J.A. 59-60) that his "challenge of the future rates relates only to the period December 16, 1950, to September 30, 1951." This statement relied upon the assumption, later proved to be erroneous, that there would be no future "excess" profits since a new lower domestic rate had been established as of October 1, 1951.

The Board stated that it considered itself to be "obliged under the judgment of the Court of Appeals * * * to reestablish mail pay rates for C & S' international operations through July 31, 1952" (J.A. 58). It further ruled that it "would reach this same result" if it were "free * * * to re-examine the rate level for the international division" as a matter of discretion since, "under all the circumstances of this case," failure to do so "would exceed the bounds of sound discretion" (J.A. 59, see also, J.A. 58). The significant circumstances were that, on the basis of the carrier's own reports, "[c]ontinued use of forecast rather than actual experience would result in a 36% return on investment, involving an overpayment to the carrier of more than $1 million in subsidy" (J.A. 58). The Board awarded total subsidy of $4,878,000 for international operations for the period 1946 to 1952—an amount which, it found, met the carrier's "need" for the period (J.A. 133-134).[3] The result of this award was a recapture of excess sub-

[3] The Board pointed out (J.A. 132-133) that:

> "* * * the mail pay need of a carrier is comprised of the amount of mail pay required to meet its breakeven need from operations, incurred under honest, economical, and efficient management, together with such rate of return on the carrier's used and useful investment, after provision for income taxes, as is required to enable the carrier to maintain its financial integrity, attract capital and compensate its investors for the risks assumed, as well as develop to the extent required to meet the objectives of the Act."

All these various factors were determined by the Board to be fully met here.

sidy of $1,795,000, of which $1,066,000 was for the period December 16, 1950-July 31, 1952 (J.A. 127).

In awarding this subsidy, the Board relied on its determinations in the earlier proceedings that a 7 percent return on investment (after taxes) for the international division for the period November 1, 1946-December 15, 1950, and for the domestic division for the period November 1, 1946-December 31, 1947, satisfied the carrier's "need." For the remaining portion of the period, the Board reviewed the carrier's actual operating results and awarded subsidy sufficient to provide a return (after taxes) of 10 percent on investment in foreign operations. The Board refused to reconsider and increase its previously-fixed 7 percent return for the past periods (J.A. 136).

The court of appeals unanimously affirmed. It held that the failure of the Postmaster General to challenge the rate level for the period 1950-1952 in the prior judicial proceedings "did not, by itself, estop or foreclose the Commission [Board] from reconsidering the matter on remand in the light of subsequent events" (Pet. 31); and that under the principle of *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, the court's mandate in the earlier review proceeding did not "den[y] the Board power to reconsider questions not raised on the first appeal" (Pet. 31-32). The court stated (Pet. 32) that "[c]onsiderations of administrative flexibility apply to airline subsidy as well as licensing proceedings, for the Board, like the Federal Communications Commission, is required 'at all times' to

gauge its actions by the public interest standard." Finally, the court found no error in the Board's determination of the appropriate rate of return (Pet. 34).

ARGUMENT

Contrary to petitioner's contention (Pet. 25, 8), this case presents no "issues * * * of far reaching importance" "to the proper administration of the mail pay provisions of Section 406 of the Federal Aviation Act." Rather, it involves merely the application of settled principles of administrative law to the particular factual situation here involved, *i.e.*, the effect of the mandate of the court below in the prior case upon the ensuing Board proceedings on remand. We submit that the court below correctly held that, under its earlier mandate and in accord with established principles, the Board was fully warranted in recomputing the international subsidy rate for the entire period in order to insure that the total subsidy allowed did not exceed "'the need' of the carrier * * * as an entity," that is, "as measured by its entire operations" (*Delta Air Lines* v. *Summerfield*, 347 U.S. 74, 79, 80).

1. In its first decision, the court below "set aside" the Board's order fixing subsidy mail pay for the carriers' international operations, and remanded the case "with directions to determine and fix the rate in accordance with this opinion," *i.e.*, that the total subsidy cannot exceed "the need of the carrier as a whole" (207 F. 2d at 210, 209). In such circumstances, "the matter once more goes to the [agency]

for reconsideration" (*Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20), and the agency is not only authorized, but indeed may be required, to apply the applicable statutory standards in the light of conditions then existing. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134; *Fly* v. *Heitmeyer*, 309 U.S. 146; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194; *Federal Power Commission* v. *Idaho Power Co.*, *supra*.

In the *Pottsville case*, *supra*, the Commission had denied an application by Pottsville for a broadcasting station construction permit. The court of appeals reversed, holding that the Commission's decision was based upon an error of law, and remanded the case to the agency "for reconsideration in accordance with the views expressed" (309 U.S. at 139). On remand, the agency did not limit itself to reconsidering Pottsville's application, but consolidated it for comparative hearing with two others. The court of appeals then issued a writ of mandamus directing the Commission to reconsider Pottsville's application on the basis of the original record, but this Court reversed. It ruled (309 U.S. at 145) that "an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge"; that the "Commission's responsibility at all times is to measure applications by the standard of 'public convenience, interest, or neces-

sity' "; and that when the reviewing court had laid bare the agency's error of law, "the Commission was again charged with the duty of judging the application in the light of 'public convenience, interest, or necessity' ".

There is no valid reason—and petitioner points to none—why the *Pottsville* principle is not equally applicable to subsidy rate proceedings under the Federal Aviation Act. Indeed, both before and after *Pottsville*, the courts have held in rate proceedings that, upon judicial remand, the agency may consider the actual experience under the rate during the period of litigation.[4] Here, as in *Pottsville*, when the reviewing court laid bare the Board's error of law—its failure to limit subsidy to the need of the carrier as a whole—the Board on remand was "again charged with the duty" of limiting subsidy to such need. As the court below stated (Pet. 32), "[t]he Board, like the Federal Communications Commission, is required 'at all times' to gauge its actions by the public interest standard".

When the Board initially fixed the subsidy for international operations, it acted on the assumption that the future rate for the period 1950-1952 would produce a return of 10 percent on investment—the

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[4] *E.g.*, *United States* v. *Morgan*, 313 U.S. 409; *McCart* v. *Indianapolis Water Co.*, 302 U.S. 419; *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133; *Northern States Power Co.* v. *Public Utilities Commission*, 73 N.D. 211, 13 N.W. 2d 779; *Alabama Public Service Commission* v. *Southern Bell Telephone and Telegraph Co.*, 269 Ala. 361, 113 So. 2d 503; *Yonkers Railroad Co.* v. *Maltbie*, 251 App. Div. 204, 296 N.Y.S. 411.

amount which the Board found the carrier "needed" on such operations. When the matter was remanded to the Board in 1954, however, the Board had available the results of actual operations under that rate, which showed that under such rate the carrier received a return of 36 percent on its international investment, rather than the 10 percent that the Board previously had found it "needed". In these circumstances, we submit that the Board was fully justified in recalculating the amount of subsidy required for that period.[5] Otherwise the total subsidy awarded would have substantially exceeded the need of the carrier as a whole—by roughly $1,000,000—contrary to the rulings of the court below and of this Court that need is the ceiling on subsidy. To have ignored the actual operating results under the future rate for the period 1950 to 1952 would have contravened the settled rule that rates are not to be fixed on the basis of forecasts when the facts are actually known, since "[t]o prefer the forecast to the survey is an arbitrary judgment." *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U.S. 79, 82;

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[5] Petitioner contends (Pet. 21-21) that the court below should have remanded the case to the Board to enable the latter to determine, in its discretion rather than as a mandatory requirement, whether it should have made the redetermination. The short answer, as the court of appeals pointed out (Pet. 34, n. 12), is that even though the Board apparently believed it had no discretion not to make the redetermination, it further held that, if it had such discretion, a failure "to re-examine the rate level for the international division" would "exceed the bounds of sound discretion" (J.A. 59); see *supra*, p. 6).

Summerfield v. *Civil Aeronautics Board*, 207 F. 2d 200, 204, affirmed *sub nom. Western Air Lines* v. *Civil Aeronautics Board*, 347 U.S. 67.

2. The Board was also fully warranted in relying upon its prior determination that the carrier needed a subsidy return of only 7 percent for certain past periods. That determination was not challenged in the prior litigation, and in adhering to it the Board followed the recognized administrative practice of relying upon prior findings where no necessity is shown for their re-examination.[6] Contrary to petitioner's contention (Pet. 24-25), nothing in this Court's decision in *Delta Air Lines* v. *Summerfield*, 347 U.S. 74, indicates or even suggests that the Board was required to re-examine these findings anew. The *Delta* case held only that need is the ceiling on subsidy, and the Board complied with that standard when it awarded petitioner an amount that satisfied that need, namely, a subsidy return on international operations, after taxes, of 7 percent for part of the past period and 10 percent for the remainder.

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[6] "Due process does not afford a party the right to treat as a rehearsal a hearing on the issues for which the hearing was adequate." *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 228. See also, *Georgia Public Service Commission* v. *United States*, 283 U.S. 765; *Pittsburgh Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503; *Crichton* v. *United States*, 56 F. Supp. 876 (S.D. N.Y.), affirmed, 323 U.S. 684.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no question warranting review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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